

(2) On Monday, March 17, 1997, claimant was working at his job for respondent. As a part of his job duties, claimant was instructed to repair a clothes dryer. As claimant attempted to move a washing machine away from the wall in order to get to the dryer, he suddenly felt a burning sensation in his back and legs.

(3) Following his injury claimant immediately sought medical treatment. He called the human resources manager for respondent to report his accident and obtain authorization to see the doctor. Claimant received medical treatment from Dana R. Richman, M.D., who took claimant off work.

(4) On the date of accident, claimant had received a second written warning for absenteeism from respondent.

(5) Claimant has a long history of back problems, including prior work-related injuries that resulted in workers compensation claims being filed in 1984, 1985, 1988, and 1991 with employers other than the respondent.

(6) Claimant's medical history includes back surgery following his 1984 injury and a second back surgery, including a fusion, following his injury in 1988.

(7) On March 24, 1997, claimant performed some home repair work for pay which consisted of remudding a ceiling, repairing holes in walls, and cracks under windows. Claimant performed this work while he was allegedly temporarily totally disabled. Claimant testified he was unable to adequately complete the job due to pain. He was ultimately sued by the home owner who was dissatisfied with his services.

(8) On March 26, 1997, claimant underwent an MRI that showed a herniated disc at L4-5.

(9) A surveillance videotape was introduced into evidence that depicts claimant engaging in certain recreational activities including camping and boating.

(10) The descriptions claimant gave of the accident, as contained in the office notes and reports of Dr. Richman, Dr. Paul S. Stein, and Dr. C. Reiff Brown are consistent with claimant's testimony. The descriptions of the injury contained in those medical records are also consistent with claimant's testimony. Claimant reported low back pain with pain radiating down his right leg.

(11) Claimant returned to Dr. Richman on March 19, 1997, with similar complaints. At that time Dr. Richman recommended an MRI which was done on March 26, 1997. The MRI showed a large central and left disc herniation at L4-5. Thereafter Dr. Richman referred claimant to Dr. Stein, a neurosurgeon.

(12) Dr. Stein examined claimant on April 17, 1997. Dr. Brown examined claimant on July 1, 1997. Both diagnosed disc herniation with nerve root impingement on the left. Both doctors also recommended further diagnostic procedures and surgical consideration.

CONCLUSIONS OF LAW

Respondent concedes that claimant's alleged accident was unwitnessed and respondent cannot provide any direct evidence that claimant's accident and injury did not occur as alleged. Respondent's defense to the compensability of this claim is twofold. First,

respondent points to the claimant's prior medical history of preexisting back problems and claimant's activity after the alleged accident date to call into question the causation of claimant's current back problems. Second, respondent points to several matters which go to the question of claimant's credibility and motivation for personal gain in bringing this claim for workers compensation benefits. These include his prior claims for workers compensation benefits, his acceptance of temporary total disability compensation benefits after having worked for wages doing the home repair work, and the surveillance videotape that respondent argues shows claimant performing activities without difficulty.

Claimant denies experiencing back problems while employed by respondent prior to the subject injury. Claimant further denies injuring his back while working for the homeowner two days after his alleged work-related injury. Furthermore, claimant asserts that none of his activities since his accident were in violation of his medical restrictions. Although claimant did endorse the back of two temporary total disability checks which bore language certifying that he had not returned to any employment as of the date of the check, claimant in fact did not return to employment after receiving the temporary total disability checks. In addition, claimant testified that he felt obligated to keep his word to the home owner by attempting to do the home repair work he had agreed to do. Furthermore, claimant asserts that the medical history he gave his doctors was accurate and substantially complete in all significant details. While claimant may have inadvertently omitted certain information, the fact that he had experienced prior back injuries and had undergone two back surgeries was always mentioned and there is no indication that the omission of any specific incident would materially alter the opinions given by the physicians.

While respondent has raised questions concerning the claimant's credibility, the overwhelming weight of the evidence supports a conclusion that claimant did suffer injury by accident on the date alleged and that his injuries arose out of and in the course of his employment with respondent. Accordingly, the award of preliminary benefits by the Administrative Law Judge should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the July 25, 1997, Order by Administrative Law Judge Bruce E. Moore should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 1997.

BOARD MEMBER

c: Andrew L. Oswald, Hutchinson, KS
P. Kelly Donley, Wichita, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director